Supreme Court of the United States

OCTOBER TERM, 1922.

No. 171.

THE UNITED STATES,

Petitioner,

v.

JEFFERSON ELECTRIC MANUFACTURING COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF FOR RESPONDENT.

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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1933.

No. 171.

THE UNITED STATES,

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v.

JEFFERSON ELECTRIC MANUFACTURING COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF FOR RESPONDENT.

Opinions Below.

The opinion of the Court of Claims on demurrer (R. 12) is reported in 38 Fed. (2) 139 and on the merits (R. 16) in 2 Fed. Supp. 778.

Jurisdiction.

The judgment of the Court below was entered on March 13, 1933 (R. 20). Petition for a writ of certiorari and motion to remand were filed June 14, 1933 and the petition was granted October 9, 1933. The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925 (43 Stat. 936).

Questions Presented.

The Respondent does not agree with the questions as stated by the Petitioner but considers that the questions are more accurately stated as follows:

1. Whether ignition coils sold for general use and not primarily adapted or specially designed for use as a component part of automobiles, motorcycles, automobile trucks, or automobile wagons were subject to tax as automobile parts or accessories under Section 900 of the Revenue Act of 1921 and Section 600 of the Revenue Act of 1924?

2. Were the taxes "passed on" to Respondent's customers and was Respondent obligated to file the bond specified in Treasury Decision 4195 and Section 424(a)(3) of the Revenue Act of 1928?

3. Does Section 424(a) of the Revenue Act of 1928 deprive the Court of Claims of jurisdiction to review the action of the Commissioner of Internal Revenue in refusing to refund excise taxes which were erroneously and illegally assessed and collected where the taxes were assumed and paid by the manufacturer and were not passed on to customers?

4. Are the special findings of the Court of Claims conclusive on appeal and sufficient to support the judgment?

5. Was the counterclaim by the Government properly dismissed.

Statutes and Regulations Involved.

Section 900 of the Revenue Act of 1918 (40 Stat. 1057, 1122).

Section 900 of the Revenue Act of 1921 (42 Stat. 227, 291).

Section 600 of the Revenue Act of 1924 (43 Stat. 253, 323).

Section 424(a) of the Revenue Act of 1928 (45 Stat. 791, 866).

Treasury Regulations 47 (1919)—Article 15—as revised without material change December 1920, December 1921, and August 1924, as Article 16.

The pertinent parts of the above are set out as Appendix A to Petitioner's brief.

Statement.

This suit was brought by Respondent in the Court of Claims to recover Manufacturers' Excise Taxes alleged to have been illegally assessed and collected for the period from April 1, 1923 to December 31; 1924 in the sum of $14,966.17 and for the period from January 1, 1925 to February 26, 1926, inclusive, in the sum of $5,051.41, a total of $20,017.58 (R. 12).

The Respondent was and is a corporation engaged in the manufacture and sale of ignition coils (Finding 1, 2) (R. 16). The ignition coil is a form of transformer and is a device that takes a low voltage, relatively high amperage current, and transforms it to a high voltage, relatively low amperage current, the resulting voltage being sufficiently high to bridge the spark gap of the spark plug, thereby supplying the flame which ignites the gas in the cylinder of any internal-combustion engine (Finding 11) (R. 18-19). The coils were not specially designed for automobiles and were in use prior to the advent of the automobile (Finding 11) (R. 19).

Respondent sold the ignition coils manufactured by it for the most part to jobbers and distributors and did not know for what special purpose the coils were to be used. Some were sold to manufacturers, wholesalers, mail order houses and dealers. None of its coils were sold for original equipment (Finding 11) (R. 19). Respondent's ignition coils were equally adapted to marine automotive, tractor truck,

motorcycle or aeroplane engines or outboard motors or concrete mixers. They were manufactured and sold for general use and were not primarily adapted or specially designed for use as a component of automobiles, automobile trucks or automobile wagons (Finding 11) (R. 19).

During the period in question Respondent invoiced its catalogue prices to all customers, and did not add thereto any amounts representing excise taxes, or collect from its customers amounts additional to the catalogue prices. The catalogue prices so invoiced and collected, were transferred by plaintiff to its general ledger account in totals without separation into any elements, such as tax, charges for parcel post, insurance. The excise tax which it considered payable was set up in additional account styled "Excise Tax Expense" (Finding 7) (R. 18). Respondent's catalogue prices were not increased or decreased by reason of the imposition of the excise taxes on automobile parts or accessories (Finding 9) (R. 18).

During the period in question the Respondent filed monthly returns of the manufacturers' excise tax and paid the taxes shown thereon on its sales of coils (Finding 2) (R. 16).

Respondent duly filed claims for refund of the taxes paid on the ground that the coils were not taxable as parts for automobiles or motorcycles (Findings 3, 4, 5) (R. 17). The claims were allowed in the amount of $47,527.29 and were rejected in the amount of $20,017.58 (Findings 3, 4, 5, 6) (R. 17-18). The rejection was based on the ground that the tax had been passed on to customers without refund and the bond specified in Treasury Decision 4195 had not been furnished (Findings 4, 5) (R. 17).

The Respondent did not give such a bond because it had assumed and paid the Manufacturers' Excise taxes sought to be recovered (R. 13, 16, 18). The Respondent, during the period February 24, 1919, to April 30, 1919, added to the purchase price on its invoices to customers $1,322.30 as tax (R. 13, 17).

The customers refused to pay the tax and the practice was abandoned in April, 1919. Thereafter Respondent assumed and paid the tax itself (R. 13, 18). No portion of the tax of $1,322.30 is sought to be recovered in this suit (R. 13) (Finding 3) (R. 17).

After rejection of the claims for refund, Respondent on March 25, 1929 brought suit in the Court of Claims (R. 1). The United States demurred to the petition on the ground that section 1241(a) of the Revenue Act of 1928 deprived the Court of Claims of jurisdiction to review the action of the Commissioner of Internal Revenue in refusing to refund the taxes paid (R. 12). The Court overruled the demurrer (R. 12) (38 Fed. (2d) 139). The United States first filed a general traverse and later a counterclaim for the excise taxes which had previously been refunded to the Respondent (R. 14).

The Court of Claims made special findings of fact (R. 16-19) and entered judgment for the Respondent in the sum of $20,017.58 and dismissed the counterclaim of the United States (R. 20-21) (2 Fed. Supp. 778).

Petition for certiorari and motion to remand were filed on June 14, 1933, and the petition was granted on October 9, 1933.

ARGUMENT.

I. The coils of respondent are not subject to tax under the facts as found by the Court of Claims, under the treasury regulations, or under the law as construed by the Courts.

In the case of *Universal Battery Co.* v. *United States,* and associated cases, 281 U. S. 580, this Court held that storage batteries of a type not primarily adapted for use on automobiles, and gascolators, a device alleged to be sold for general use on various types of internal combustion engines, could not be regarded as parts or accessories of automobiles

unless there are affirmative findings on the issue of primary adaptation. This Court said:

> "Certainly it would be unreasonable to hold that articles equally adapted to a variety of uses and commonly put to such uses, one of which is use in motor vehicles, must be classified as parts or accessories for such vehicles" (pp. 583-584).

The test of taxability prescribed by Article 15 of Regulations 47 (Revised) approved by this Court in *Universal Battery Co.* v. *United States,* 281 U. S. 580, is as follows:

> "ART. 15. *Definition of parts.*—A 'part' for an automobile truck, automobile wagon, other automobile, or motorcycle is any article designed or manufactured for the special purpose of being used as or to replace a component part of any such vehicle, and which by reason of some peculiar characteristic is not such a commercial commodity as would ordinarily be sold for general use, and which is primarily adaptable only for use as a component part of such vehicle." * * *

So an article which is equally adapted to or designed for other uses is not subject to tax as a part of an automobile.

In the case at bar the Commissioner of Internal Revenue found that the coils sold by Respondent were not taxable as parts of an automobile and refunded part of the taxes paid. The balance of the taxes were unrefunded not because the coils were parts of an automobile but because the Commissioner considered that the tax had been passed on to Respondent's customers.

As to the coils of Respondent the Court of Claims found:

> "They were not specially designed for automobiles. Prior to such automobile use the coil was being used for stationary internal-combustion engines; also for motorcycles, and marine works" (Finding 11) (R. 19).

> "Plaintiff sold the ignition coils, manufactured by it and involved in this suit, for the most part to jobbers and distributors, and did not know for what special pur-

pose such coils were to be used. Some were sold to manufacturers, wholesalers, mail-order houses, and dealers. None of its coils were sold for original equipment" (Finding 11) (R. 19).

"Plaintiff's ignition coils were equally adapted to marine, automotive, tractor, truck, motorcycle, or airplane engines, and to outboard motors and engines for concrete mixers. They were manufactured and sold for general use and were not primarily adapted or specially designed for use as a component of automobiles, motorcycles, automobile trucks, or automobile wagons" (Finding 11) (R. 19).

In view of these findings the coils of Respondent are not subject to tax as automobile parts under the following decisions:

Atwater Kent Mfg. Co. v. *United States*, 62 Ct. Cls. 419;

Wells Mfg. Co. v. *United States*, 66 Ct. Cls. 283;

Milwaukee Motor Products v. *United States*, 66 Ct. Cls. 295;

Philadelphia Storage Battery Co. v. *Lederer* (D. C.), 21 Fed. (2d) 320;

General Lead Batteries Co. v. *United States* (Ct. Cls.), 60 Fed. (2d) 177;

Routzahn v. *Willard Storage Battery Co.* (C. C. A. 6), 65 Fed. (2d) 89;

Dutton & Sons v. *United States* (Ct. Cls.), 59 Fed. (2d) 839;

Anthony Co. v. *United States* (Ct. Cls.), 56 Fed. (2d) 481;

Boyle Valve Co. v. *United States* (Ct. Cls.), 38 Fed. (2d) 135;

Electric Storage Battery Co. v. *McCaughn* (D. C.), 52 Fed. (2d) 205;

McCaughn v. *Electric Storage Battery Co.*, 63 Fed. (2d) 715;

U. S. Light & Heat Corp. v. *United States,* 3 Fed. Supp. 861;
Universal Storage Battery Co. v. *United States,* 3 Fed. Supp. 878;
Englert Mfg. Co. v. *United States,* 3 Fed. Supp. 873;
M & M Co. v. *United States,* 3 Fed. Supp. 886.

There is no conflict in the decisions of the Circuit Courts of Appeal.

The rule of chief or principal use has no application to the facts of this case because the Treasury Department has admitted that the articles manufactured by the Respondent are not parts of automobiles by refunding part of the taxes paid. The sole basis of the rejection of the balance of the claims for refund was that the tax had been passed on to customers and that the bond specified in Treasury Decision 4195 had not been furnished (Findings 3, 4, 5, 6) (R. 17-18).

While the rule of chief or principal use has been applied in cases arising under the Tariff laws, it can have no application to the facts as found in this case.

Duties are levied under the Tariff Acts upon articles "chiefly used" for a particular purpose or articles "manufactured wholly or in part of" a certain material or articles "wholly or in chief value" of a certain kind.

Compare

Cadwalader v. *Wanamaker,* 149 U. S. 532.

The theory of chief or principal use has never been embodied in the excise tax laws and has never been adopted in the Excise Tax Regulations as a basis of taxability. In the imposition of excise taxes, chief use has no application where there is a question of equal adaptability to various uses since a product adapted or designed for a variety of uses is not subject to tax.

The cases of *Magone* v. *Wiederer,* 159 U. S. 555, and *Magone* v. *Heller,* 150 U. S. 70, decide that the chief or prin-

cipal use of an article is determinative of its proper tariff classification, except where the article is "commonly, practically and profitably used for a different purpose".

The findings of the Court below are sufficient to meet the test of the Regulations particularly since the coils have been and are used with every and any internal combustion engine. The motion of Petitioner to remand the case to the Court of Claims for further findings should, on the record, be denied.

II. The taxes were not "passed on" to respondent's customers and respondent was not obligated to file the bond specified in treasury decision 4195 and Section 424(a)(3) of the Revenue Act of 1928.

This case involves a statute imposing a Manufacturer's Excise Tax. The tax is imposed on the manufacturer, not an the customer. It is *not* a Sales Tax and cannot be "passed on" as such to customers because it is either paid by the manufacturer based on his selling price to a purchaser or is absorbed in the cost of the product to a purchaser.

Section 628 of the Revenue Act of 1918 levied a tax on soft drinks sold by the manufacturer. The statute is in all respects similar to the one now before the Court. This Court held that the tax could not be "passed on" to the customer in *Lash's Products Company* v. *United States,* 278 U. S. 175, saying:

> * * * "This tax was paid by the petitioner, calculated at ten per centum of the sum actually received by it for the goods sold. But the petitioner had notified its customers beforehand that it paid the ten per cent. tax and it contends that in this way it passed the tax on and that the true price of the goods was the sum received less the amount of the tax. The phrase 'passed the tax on' is inaccurate, as obviously the tax is laid and remains on the manufacturer and on him alone. *Heckman & Co.* v. *I. S. Dawes & Son Co.*; 12 F. (2d) 154. The purchaser does not pay the tax. He pays or may pay the seller

more for the goods because of the seller's obligation, but that is all." * * * (pp. 175-176).

The uncontradicted evidence and findings in the case at bar show that the taxes were not "passed on" to customers but were borne by Respondent. The findings are conclusive that the tax was assumed and paid by Respondent and was not "passed on" to its customers.

The Court below found:

"7. For the taxable period in question, viz., May 1919 to the end of February 1926 plaintiff, in the sale of ignition coils, invoiced its catalogue prices to all customers, and did not add thereto any amounts representing excise taxes, or collect from its customers amounts additional to the catalogue prices. The catalogue prices so invoiced and collected, were transferred by plaintiff to its general ledger account in totals without separation into any elements, such as tax, charges for parcel post, insurance. The excise tax which it considered payable was set up in an additional account styled 'Excise Tax Expense'" (R. 18).

"8. For a part of the taxable periods in question plaintiff made on its invoices to customers certain notations with respect to the excise tax which it considered applicable.

Up to May 19, 1923, plaintiff made no such notations on its invoices to customers.

Beginning May 19, 1923, up to December 29, 1925, it was plaintiff's practice to note on its invoice as to customers the following: 'On automotive accessories 1/21 of amount indicated herein equals 5% excise tax. 20/21st of amount indicated equal price,' during the period when the 5% tax rate was in effect, and substantially the same notation during the period when the 2½% rate was in effect, '1/21' being changed to '1/41' and '20/21' to '40/41.' It does not definitely appear what the practice was thereafter as to notations on invoices" (R. 18).

"9. Plaintiff's catalogue prices were not increased or decreased by reason of the imposition of the excise tax on automobile parts or accessories" (R. 18).

The taxes were *not in fact* collected from its customers but were assumed and paid by Respondent.

The method of billing customers does not establish that the tax was "passed on". The tax was so billed to meet the requirements of Article 3 of Treasury Regulations 47 (Revised December, 1920) (Revised December, 1921) (Revised August, 1924) and for no other purpose.

Since the taxes were assumed and paid by the Respondent, there is no obligation to file the bond specified in Treasury Decision 4195 and Section 424(a)(3) of the Revenue Act of 1928.

As the Court below aptly said in its opinion, in the case at bar, on demurrer, 38 Fed. (2d) 139, 140:

> "* * * Defendant overlooks the fact that the section provides that a refund may be made without a bond if it is shown that the tax was wholly borne and paid by the manufacturer. In such case no bond is necessary under subsection (a)(3)" (R. 13).

III. The Court of Claims has jurisdiction over suits to recover internal revenue taxes and Section 424(a) of the Revenue Act of 1928 does not in fact limit the jurisdiction of that Court to review the action and findings of the Commissioner of Internal Revenue.

The general jurisdiction of the Court of Claims over suits to recover internal revenue taxes has been long established.

> *United States* v. *Savings Bank,* 104 U. S. 728;
> *United States* v. *Kaufman,* 96 U. S. 567;
> *Cf. United States* v. *Emery, Bird, Thayer Realty Co.,* 237 U. S. 28.

The Court below found that the tax had not been passed on to Respondent's customers (Findings 7-9) (R. 18). Therefore, the primary requirement of section 424 has been met.

The question of jurisdiction under section 424(a) of the Revenue Act of 1928, has been raised in similar cases and the courts have sustained their jurisdiction.

Boyle Valve Co. v. *United States*, 38 Fed. (2d) 135;
Jefferson Electric Mfg. Co. v. *United States*, 38 Fed. (2d) 139;
Routzahn v. *Willard Storage Battery Co.*, 65 Fed. (2d) 89;
McCaughn v. *Electric Storage Battery Co.*, 63 Fed. (2d) 715, affirming 52 Fed. (2d) 205;
American Chain Co. v. *Eaton*, 58 Fed. (2d) 246.

The reasoning in the above decisions may be summarized as follows. The determination of whether the manufacturer's excise "tax was collected directly or indirectly from the purchaser"—namely—"added to the purchase price of the article", is an ordinary question of fact, one with respect of which the courts constantly review the Commissioner's determination and one that is involved in almost every suit for refund". Section 424(a) of the Revenue Act of 1928 as shown by the Report of the Ways and Means Committee of the House "deals not with rights of action, but with limitations upon the power of the Commissioner to make refunds", because it "nowhere refers to the plaintiff's right of action to recover taxes by litigation nor to the jurisdiction of the Court", in other words the section is not jurisdictional but "an administrative measure for the guidance of the Commissioner in the refund of taxes" and "does not purport to contain any provision prescribing conditions under which taxes may be collected by means of a suit".

In *Routzahn* v. *Willard Storage Battery Co.*, 65 Fed. (2d) 89, the Court said:

> * * * "Section 424(a) deals not with rights of action, but with limitations upon the power of the commissioner to make refunds. Its provisions are not in conflict with the general provisions of law authorizing suits for refund of taxes." * * *

> * * * "Reading the section literally, however, with the alternative provisions of its several paragraphs in mind, the purpose of the Congress to prevent the manufacturer from enriching himself by recovery of a tax that he has himself not paid, but has passed on to the consumer, appears in bold relief. It is also clear from the legislative record of the section" (p. 93).

In *McCaughn* v. *Electric Storage Battery Co.*, 63 Fed. (2d) 715, the Court said:

> "* * * This act refers to a refund of taxes by the Commissioner and not to a right of action by the taxpayer to recover taxes paid * * *" (p. 717).

In *Boyle Valve Co.* v. *U. S.*, 38 Fed. (2d) 135, the Court said:

> "The section provides in subdivision (2) that no refund shall be made unless it is established to the satisfaction of the Commissioner that such amount was in excess of the amount properly payable upon the sale of an article subject to tax, or, that the amount was not collected directly or indirectly from the purchaser, or that the amount, although collected from the purchaser, was returned to him. This is merely a requirement that the establishment of the fact required by the statute shall be necessary before any refund can be made. There is nothing discretionary in the Commissioner about it. The words 'to the satisfaction of the Commissioner' used in the act were inserted to make it clear that Congress intended that strict proof should be required. But this does not prevent a taxpayer upon the rejection of his refund claim from bringing suit to recover the tax alleged to have been erroneously or illegally collected, and, if he can do so, to establish to the satisfaction of the court whether he is entitled to a refund under the terms of the act. The case of Williamsport Wire Rope Co. v. United States, 277 U. S. 551, 48 S. Ct. 587, 72 L. Ed. 985, does not suppose the claim that section 424 makes the question whether an article sold is an automobile part or an accessory discretionary with the Commissioner. The determination whether the tax was collected by the manufacturer directly or indirectly

> from the purchaser; that is, whether it was added to the purchase price of the article upon the sale of which the tax was imposed, either as a separate item or as a part of the sales price, is an ordinary question of fact; one with respect of which the courts constantly review the Commissioner's determination and one that is involved in almost every suit for refund. It is a question of a type requiring no particular skill or knowledge of accountancy, but merely the ability to weigh evidence and to determine when to believe a witness" (p. 137).

Section 424 does not make the Commissioner's finding exclusive or conclusive nor does it take from the Courts the right to review his determination and find the ultimate facts, a function which they perform in reviewing the action of the Commissioner in nearly all tax suits.

Also in *Boyle Valve Co.* v. *U. S.*, 38 Fed. (2d) 135, the Court considered the report of the Ways and Means Committee of the House and the proviso of the Deficiency Act of December 22, 1927 and concluded that the stated purpose as shown by the report of the Committee was to prevent the refund of excise taxes to a manufacturer who had not paid the tax, but had passed it on to the consumer. The Court said:

> "* * * We think it is clear when the proviso of the deficiency act of December 22, 1927, section 424, Revenue Act of 1928, and the committee report are considered that what Congress intended was that in case such as we have here no refund of a tax of the character here involved should be made to a manufacturer unless it should be established that he had paid the tax and had not collected any portion thereof directly or indirectly from any one else who may have purchased the articles upon the sale or lease of which the tax was imposed" (p. 137).

A construction which would oust the jurisdiction of the Federal Courts in Internal Revenue tax cases would raise a serious question as to the constitutionality of the legislation, because:

1. General jurisdiction has been conferred upon the Federal Courts in suits arising under the internal revenue laws and those provisions are not expressly limited or repealed by Section 424 of the Revenue Act of 1928.

2. The Section would provide a limitation on suits as of April 30, 1928, thirty days prior to the passage of the Revenue Act of 1928 on May 29, 1928, which would violate the rule that in changing the period of limitations a reasonable time must be given by the new law for the bringing of an action before the bar takes effect.

3. The ousting of the jurisdiction of the Courts to determine whether taxes have been illegally collected and the vesting of that function exclusively in the Commissioner of Internal Revenue, clearly violates the due process provisions of the Fifth Amendment to the Constitution.

4. Petitioner's contention presents a clear case of encroachment by the Legislative branch on the functions of the Judicial branch which is prohibited by Section 1, Article III of the Constitution.

Clearly Section 424 is not expressly or by implication a limitation on the general jurisdiction of the courts to determine questions of fact in tax cases and to enter a judgment that the tax was erroneously and illegally collected.

The case of *Williamsport Wire Rope Co.* v. *United States*, 277 U. S. 551, involved the special relief provisions of the Revenue Act of 1918 and required a determination and computation based upon information facts and data peculiarly within the knowledge and keeping of the Commissioner and involving the tax returns of other taxpayers. Such information was not available to the Courts.

Section 327 applied to cases:

> "Where the Commissioner is unable to determine the invested capital as provided in Section 326:
>
> Where a mixed aggregate of tangible property and intangible property has been paid in for stock or for

stock and bonds and the Commissioner is unable satisfactorily to determine the respective values of the several classes of property at the time of payment, or to distinguish the classes of property paid in for stock and for bonds, respectively;

Where * * * the Commissioner finds and so declares of record that the tax if determined without benefit of this section would, owing to abnormal conditions affecting the capital or income of the corporation, work * * * an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of this section and the tax computed by reference to the representative corporations specified in section 328."

Section 328 provided:

"In computing the tax under this section the Commissioner shall compare the taxpayer only with representative corporations whose invested capital can be satisfactorily determined under section 326 and which are, as nearly as may be, similarly circumstanced with respect to gross income, net income, profits per unit of business transacted and capital employed, the amount and rate of war profits or excess profits, and all other relevant facts and circumstances."

As this Court said in the *Williamsport Case*:

* * * "The task imposed on the Commissioner by §§ 327 and 328 was one that could only be performed by an official or a body having wide knowledge and experience with the class of problems concerned." * * * (p. 558).

"To perform that task, power, discretionary in character was necessarily conferred." * * *

* * * "The conclusions reached would rest largely upon considerations not entirely susceptible of proof or disproof" (p. 559).

Under Section 424 of the Revenue Act of 1928, of course, there is nothing of this character. The question whether the tax has been "passed on" to the customer is one of fact readily susceptible of proof and judicial determination.

IV. The special findings of fact by the Court of Claims are conclusive on appeal and sufficient to support the judgment.

Rule 38, Paragraph 3, of the Rules of this Court provides:

> "The special findings required by the two preceding paragraph shall be in the nature of a special verdict, and *shall set forth the ultimate facts found from the evidence*, but not the evidence from which they are found." (Italics supplied.)

The special findings of the Court below and the "ultimate facts" found are sufficient to support its judgment and fully comply with the foregoing rule of this Court.

> *Luckenbach S. S. Co.* v. *United States*, 272 U. S. 533.

In addition the Court below said in its opinion summarizing the evidence (2 Fed. Supp. 778, 780):

> "All of plaintiff's sales of ignition coils were taxed whether they were advertised for use on automobiles or not; the entire amount of excise tax paid during the period involved had been proved; *none of plaintiff's ignition coils were especially adapted for use in automobiles; none of plaintiff's ignition coils were sold by plaintiff to automobile manufacturers, dealers, or owners for use on automobiles; all* of plaintiff's ignition coils *were equally adapted for use on any internal-combustion engine*, and as the plaintiff sold to wholesalers, jobbers, mail order houses and dealers, *and as their use was general* in any kind of internal-combustion engine, it was not within plaintiff's knowledge to what particular use they were put" (R. 20). (Italics supplied.)

The findings of the Court below are conclusive on appeal.

> *Cramp & Sons, et al.* v. *United States*, 239 U. S. 221;
> *Hathaway* v. *United States*, 249 U. S. 460;
> *Keokuk & Hamilton Bridge Co.* v. *United States*, 260 U. S. 125;

Milliken v. *United States*, 283 U. S. 15;
United States v. *Anderson*, 269 U. S. 422;
Rogers v. *United States*, 270 U. S. 154;
United States v. *Swift & Co.*, 270 U. S. 124.

In *United States* v. *U. S. Fidelity and Guaranty Co.*, 236 U. S. 512, this Court said:

> "Assuming these defenses were properly pleaded, we still need spend no time upon them, since the argument made here to support them is based, not upon the findings, but upon a general review of the evidence and a series of inferences drawn from it that are inconsistent with the facts as found by the trial court. The findings have the same effect as the verdict of a jury, and this court does not revise them, but merely determines whether they support the judgment" (p. 527).

In *Anglo-American, etc., Co.* v. *Lombard*, 132 Fed. 721, Justice Van Devanter, then Circuit Judge, said:

> "In actions at law, where a trial by jury is waived, the duty of finding the facts is placed upon the trial court. We have no authority to examine the evidence for the purpose of finding the ultimate facts, or of correcting or completing a special finding which is imperfect or incomplete" (p. 734). (Citing cases.)

The findings of the Court of Claims were based upon extensive testimony taken before a Commissioner of the Court and upon his report to the Court. It is idle to speculate upon what particular evidence the Court based its ultimate findings because the findings speak for themselves. They are conclusive on appeal and are sufficient to support the judgment entered.

V. The counterclaim of the Government was properly dismissed because no evidence was presented in support of the claim.

Upon the findings of the Court below the dismissal of the counterclaim was proper, particularly since the Government offered no proof in support of its counterclaim and because there was no basis in fact for the counterclaim.

CONCLUSION.

The Court of Claims had jurisdiction to review the findings of the Commissioner of Internal Revenue and it is apparent from the facts found by the Court that the articles manufactured by the Respondent were not taxable as "parts" of an automobile and that the taxes were not passed on to Respondent's customers. The findings of the Court are sufficient to support its judgment and are conclusive on appeal.

The judgment of the Court of Claims should be affirmed and the motion to remand denied.

Respectfully submitted,

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